FILED: Nov. 25, 1992

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE	)	
	)	No. B056366
Plaintiff and Respondent,	)	
	)	(Super. Ct.No.
	)	BA010253)
v.	)	
	)	
TROY ISAIAH MITCHELL,	)	
	)	
Defendant and Appellant.	)	
_____	)	

Statement of the Case

Jerry "Judabean" Knox (victim) died after being shot several times and run over by a vehicle. Appellant was charged with murder (Pen. Code, § 187 (a).). It was also alleged that appellant personally used a firearm. A jury convicted him of second degree murder. The jury did not find the personal use allegation to be true, nor did they find that appellant was the driver of the vehicle that ran over victim.

Facts of the Case

Maurice Taylor (a Four Tray Hoover Crips gang member) told police, in the few days after the victim was murdered, that appellant (a Rolling Forties Crips gang member) yelled "Fuck Hoovers" in the direction of the victim (a Four Tray Hoover Crips gang leader). The victim was in the street in front of appellant's apartment building at the time. In response to this insult, the victim, two other people (Eight-Ball and Big Black), and Taylor

ran up to appellant's apartment and a fist fight ensued in which the victim was fighting with appellant. Shortly after the fight was over, Taylor saw appellant and three other Rolling Forty Crips get into a vehicle which drove by the spot where Taylor and his friends were. Someone in the car yelled out "Neighborhood Rolling Forty Crips" and appellant leaned out of the window and fired four times hitting Big Black in the leg and the victim in the arm.

At trial Taylor testified that he had lied to the police. He never saw appellant yell anything. He never saw the victim fighting with appellant. He only heard two shots after which he saw that "Big Black got shot in the ankle, and Judabean got shot in the shoulder." He didn't see who shot them.

Taylor also testified that his own gang would consider him a snitch and probably kill him if he helped the police, even though appellant was in a rival gang. He said that when he got out of prison that he planned to live at a location which is within Rolling Forties territory and

if he testified against appellant there "would be another war."

> In his trial testimony, Taylor said that after the first shooting he and Eight-Ball took Big Black to the hospital and the victim went home. When he returned from the hospital the victim was back out in the street but by this time he had been shot several more times, run over by a car, and was dead.

Kimberly Johnson was the victim's girlfriend. She was taking the victim to the hospital after he had been shot in the arm. As they passed appellant's apartment, she saw several people near appellant's apartment and a "real long black gun" sticking out over the balcony. The victim told her to stop and he exited the vehicle. The victim yelled out, "I dare you to shoot me". The men on the balcony started shooting. The victim fell to the ground and the shooting continued. The men came down the stairs and started shooting at her vehicle so she drove away.

Maria Valdivia lived across the street from appellant. At the time of the first shooting (in which the victim was shot in the arm), she heard a shot. When she looked outside she saw people running and one of them had his foot raised and was being carried by two others. Later that night, at the time of the second shooting (in which the victim was killed), she saw appellant and another man on the balcony shooting down. They were soon joined by eight or nine other men who all were shooting down. At that moment she saw the victim fall to the ground. Everyone then began to run and she saw appellant get into a car. That car drove down the street and ran over victim.

An autopsy revealed that in addition to the first gunshot wound to the arm that had been bandaged, the victim sustained non-fatal wounds to the arm and leg and one fatal wound to the neck. The bullet that entered the victim's neck struck his spinal cord in such as manner that it would have caused immediate paralysis from the middle

of the chest down. The medical examiner said that if the victim had not been run over and if he had received medical attention, its possible that he could have survived the neck wound. The victim's cause of death was determined to be gunshot wounds and blunt force trauma (from the vehicle).

Investigating officers found 54 shell casings at the scene.[1/] The casings were of three different calibers, .22, .45, and 9mm. Seventeen casings were found on the staircase of appellant's apartment.

Discussion

I.

Appellant concludes, from the jury's findings that the allegations of personal firearm use and driving of the vehicle were not true, that their verdict of guilty must be based on an aiding and abetting theory, and then argues

---

1. In addition to this victim, four other people were hit by the gunfire including Mrs. Valdivia's son, who was shot twice, and a 17-year old friend of his from school who was killed.

that there was insufficient evidence that appellant aided and abetted the murder of victim. Appellant opines that because the jury did not find beyond a reasonable doubt that appellant personally used a firearm in the commission of the murder and did not find beyond a reasonable doubt that appellant drove the vehicle that ran over the victim, that the jury necessarily did not believe the testimony of Mrs. Valdivia. Therefore, appellant postulates, "[t]here was no evidence, either direct or circumstantial, from this witness to support the aiding and abetting theory. This deduction is flawed. The testimony from Mrs. Valdivia was that appellant was one of eight or nine people on the balcony at the time the victim was shot and that "[t]hey all fired, I would imagine at the same time, because it was tremendous firing. At that moment I saw that someone (the victim) fell to the ground." As to the vehicle, which was parked in a dark area, Mrs. Valdivia said, "Then he ran and he got into the car. He started the car very quickly and he made a turn and he ran with the car over

the boy." She also testified that she thought another person got into the same car. The fact that the jury was unable to find beyond a reasonable doubt that appellant personally used a firearm in the commission of the murder or that he was the driver of the vehicle based on this testimony is not difficult to understand. These findings by the jury, however, do not lead to the inescapable conclusion that "the jury did not believe her testimony at all" as appellant contends. Credibility of the witnesses and the weight to be given their testimony is a determination for the jury. (Evid. Code, § 312.) In addition to Mrs. Valdivia's testimony, the jury had the evidence of Taylor's original statements to the police, the corroborating testimony of Ms. Johnson, and the physical evidence of 17 shell casings found on staircase of appellant's apartment. There was substantial evidence to support the jury's verdict.

II

Appellant's second contention is that the court erroneously instructed the jury which deprived him of due process.

The jury asked a question regarding aiding and abetting.[2/] The court told the jury that it was not going to answer the question as presented, but instead responded to the question by giving an additional instruction. Although the court stated at that time "I talked to the attorneys and this is what we're going to state", we need not discuss a waiver of any defect because none exists. The court began its additional instruction as follows: "If you find the defendant let or allowed firearms into his apartment with the intent and mental state as defines murder of the first or second degree, then the answer to your question is yes, which means that if you

---

2. ". . . is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequence (murder) if he allows/or facilitates or promotes the introduction of deadly firearms into his home?"

found that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first or second degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no." (Emphasis added.) The court then referred the jury to CALJIC instructions 3.00 (principals defined), 3.01 (aiding and abetting defined), 3.02 (principals liability for natural and probable consequences), 3.31 (specific intent) and 3.31.5 (mental state).

Appellant argues that, by its use of the term 'allow', "[e]ssentially, the court told the jury that appellant was strictly liable for the consequences of someone entering his house with firearms, and the jury did not need to determine whether appellant had the requisite intent for aiding and abetting." It is difficult to conceive how appellant can start with this record and arrive at the conclusion that the jury was told that they could find guilt

without intent. If appellant is arguing that the requisite intent for aiding and abetting includes an intent to encourage, assist, or facilitate, but does not include the intent to actually commit the crime, then appellant is simply wrong. (People v. Beeman (1984) 35 Cal.3d 547, 561; People v. Cooper (1991) 53 Cal.3d 1158, 1164). If appellant is arguing that the jury might misinterpret the instruction to mean that appellant could only be found guilty on an aiding and abetting theory if he had the intent to actually commit the murder, then appellant has failed to explain to us how he was prejudiced by the court's failure to instruct on two additional theories of guilt. Appellant's contention on this issue is utterly devoid of merit.

III

Appellant next argues that the court erred when by modifying CALJIC 2.50. The modification was the removal of the term conspiracy and inserting instead " . . . an

agreement, aiding and abetting and/or unlawful purpose." The record is clear that the prosecution wanted the term conspiracy to remain and to further have the court instruct on conspiracy. Appellant did not want this, and the court proposed this modification, with which appellant was in agreement. Again, however, we need not discuss the fact of a waiver, because the instruction as modified was proper. Appellant's argument, in essence, is that conspiracy is a crime while aiding and abetting is simply a theory of liability. Therefore, "using other crimes evidence to show aiding and abetting does not follow, since aiding and abetting is not itself a crime." Appellant's contention is meritless. CALJIC 2.50 allows the use of evidence of other crimes for the limited purpose of determining if it tends to show intent, identity, motive, knowledge, etc. None of these things are crimes. The fact that the court substituted something that is not a crime in place of conspiracy, which is a crime, has absolutely no bearing on its propriety. Turning to the instruction itself, use of

evidence of other crimes which "tend[s] to show . . . the existence of an agreement, aiding & abetting, and/or unlawful purpose," is simply another way of saying it can be used if "the crime charged is part of larger continuing plan, scheme or conspiracy." Such use of other crime evidence has specifically been approved. (CALJIC 2.50; Evid. Code, § 1101; People v. Haslouer (1978) 79 Cal.App.3d 818.)

IV

Appellant next contends that he was denied effective assistance of counsel. In support of this contention appellant states that trial counsel failed to object to the giving of the modified version of CALJIC 2.50 and, also, failed to object to prosecutorial misconduct during final argument. As relates the first contention, its clear from the record that trial counsel preferred this modified instruction to the unmodified version which, as the trial court alluded to, the prosecution was probably entitled to. There would, therefore, be no reason to object. Also, for

the reasons discussed above, the instruction was proper. As to the second contention, appellant cites nothing in the record to support the claim of prosecutorial misconduct in closing argument. Respondent pointed this deficiency out to appellant in its response brief but appellant's reply brief does not address this defect. In order to evaluate appellant's claim of insufficiency of the evidence, we reviewed the record of the evidence in this case. Argument is not evidence. We, therefore, were not required to review it. In light of the apparent fact that appellant is unable to find any misconduct in the argument, there is no need for us to look however, in the

interest of justice, we did review the argument and we find no misconduct.

The judgment is affirmed.

NOT TO BE PUBLISHED.

"s/ J. D. Lord , J.
J. D. LORD*

We concur:

"s/ Fukuto , Acting P.J.
FUKUTO

"s/Nott , J.
NOTT

* Assigned by the Chairperson of the Judicial Council.